Filed 12/29/08 In re E.M CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re E.M. and J.M., Persons Coming Under the Juvenile Court Law.	2d Juv. No. B204975 (Super. Ct. No. J1175103, J1175104) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD WELFARE SERVICES, Plaintiff and Respondent, v. J.W., Defendant and Appellant.	

J.W. ("Mother") appeals orders of the juvenile court denying a modification petition, declaring that her children E.M. and J.M. are adoptable, and terminating her parental rights. (Welf. & Inst. Code, §§ 388, 366.26, subd. (c)(1).)[1] We affirm.

FACTS AND PROCEDURAL HISTORY

On May 10, 2006, Santa Barbara County Child Welfare Services ("CWS") filed a dependency petition on behalf of 10-year-old E.M. and 7-year-old J.M. CWS alleged that Mother had threatened and attempted suicide in the children's presence. CWS alleged that Mother's mental illness presents a substantial risk of serious physical

[1] All further statutory references are to the Welfare and Institutions Code.

harm to her children. (§ 300, subd. (b).) CWS also alleged that the children's father lives in Northern California and does not share custody of the children.[2]

The juvenile court ordered the children detained and placed in the care of their maternal grandmother. On June 12, 2006, the court sustained the allegations of the dependency petition, continued the children in the care of their grandmother, and ordered CWS to provide family reunification services to Mother.

The family reunification services plan required Mother to participate in parent education, submit to a psychological evaluation, and participate in individual counseling, among other things. A social services report prepared for the jurisdiction and disposition hearing stated that Mother suffered from epilepsy, severe depression, and bipolar disorder.

Doctor Muriel Yanez, a clinical psychologist, met with and evaluated Mother. Doctor Yanez noted that Mother had a history of mental illness, suicide attempts, and a severe seizure disorder. Mother admitted to six or seven suicide attempts, including in the evening prior to the evaluation. During the evaluation, Mother appeared disheveled and exhibited emotional lability and blocked speech. Doctor Yanez opined that Mother was "not fit and competent to parent" due to her acute mental illness and instability. She also concluded that Mother "needs to be stable (significant symptom remission) for at least a full year prior to being considered for having custody of her children."

During the 12-month family reunification services period, police officers arrested Mother for filing a false crime report. Mother also made many calls to a mental health crisis line, and attempted suicide four times by overdosing on opiates, prescription medications, or Tylenol. Three of the suicide attempts required hospital stays and treatment. She had visited the hospital emergency room approximately 60 times within the year and had been involuntarily committed in October 2006 for another suicide attempt. CWS opined that Mother made only minimal progress in her services plan.

[2] The children's father is not a party to this appeal.

At the 12-month review hearing on June 11, 2007, the juvenile court terminated family reunification services and set the matter for a permanent plan hearing. (§ 366.26.)

On October 11, 2007, Mother filed a modification petition pursuant to section 388, stating that she is mentally stable, participates in counseling, and adheres to her medication regimen. She requested custody of her children and family maintenance services. Mother attached statements from friends and mental health professionals supporting her modification petition.

On December 3, 2007, the juvenile court held a combined modification petition and permanent plan hearing. The court received evidence of CWS reports, the modification petition and its evidentiary attachments, and testimony from witnesses, including the children. CWS stated that the maternal grandmother intends to adopt the children. Mother testified that she had obtained employment, had not contacted the mental health crisis line during the last year, and was engaged to be married.

After hearing argument from the parties, the court denied the modification petition. The trial judge stated: "[T]here have been changes. I think there is changing going on. . . . I think you're stable in the short term [but] we need more than seven or eight months of progress." The court ruled that reunification is not in the best interests of the children. It then determined by clear and convincing evidence that the children are likely to be adopted, and it terminated parental rights.

Mother appeals and contends that the juvenile court: 1) abused its discretion by denying the modification petition; 2) improperly denied the beneficial relationship exception to adoption; and 3) erred by not applying recent amendments to section 366.26.

DISCUSSION

I.

Mother argues that the juvenile court abused its discretion by denying the modification petition, because the court applied an incorrect legal standard. She relies upon the court's statements that the law did not permit further reunification services after

the 12-month services period here ("I wish we had more time to work with, but, statutorily, we don't have more time"). Mother contends that her significant progress is an unusual circumstance justifying further services.

The juvenile court may modify an order if a parent shows, by a preponderance of the evidence, changed circumstances or new evidence, and that the modification would promote the best interests of the child. (§ 388; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446.) In determining the best interests of the child, the juvenile court shall consider the reason for the dependency, the reason the problem was not overcome, the strength of the parent-child and child-caretaker bonds, the length of time the child has been a dependent, the nature of the change of circumstance, the ease by which the change could be achieved, and the reason it was not made sooner. (*Id.* at pp. 446-447.) We test the juvenile court's decision for an abuse of discretion. (*Id.* at p. 447.)

The juvenile court did not abuse its discretion by denying the modification petition because Mother did not establish changed circumstances and that a change would be in her children's best interests. Mother established only that she had been stable for seven months in treating her severe and intractable mental disorders. Mother has a long history of depression and suicide attempts, dating from adolescence to the present time. Doctor Yanez opined that Mother required at least one year of significant symptom remission and stability prior to a return of custody.

Moreover, the juvenile court concluded that reunification was not in the best interests of the children: "So, if my only choice at this point is reunification plus services, I can't conclude that that's in the best interests of the minors, either of the children, either for the purposes of granting the 388 or for the purposes of denying the [366.26]."

In sum, there is no error. """[C]hildhood does not wait for the parent to become adequate.""" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with

the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*Ibid.*)

II.

Mother asserts that the juvenile court improperly considered the grandmother's statement that she would allow Mother's visitation with the children following adoption. Mother argues that the statement is irrelevant and implicitly precluded the court from considering and applying the beneficial parental relationship exception to adoption. (§ 366.26, subd. (c)(1)(A).)[3] She points out that she consistently visited the children and they enjoyed the visits and loved her.

Section 366.26, subdivision (c)(1), requires the juvenile court to terminate parental rights if it finds by clear and convincing evidence that a child is likely to be adopted, unless "the court finds a compelling reason for determining that termination would be detrimental to the child" due to an enumerated statutory exception. The "beneficial parental relationship" exception of section 366.26, subdivision (c)(1)(A), requires a showing of "regular visitation and contact" and "benefit" to the child from "continuing the relationship." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) "To meet the burden of proof, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) Only in the "extraordinary case" can a parent establish the exception because the permanent plan hearing occurs after the court has repeatedly found the parent unable to meet the child's needs. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The exception requires proof of "a parental relationship," not merely a relationship that is "beneficial to some degree but does not meet the child's need for a parent. (*Ibid.*)

The juvenile court's implied finding that no statutory exception to termination of parental rights exists is proper. Mother did not meet her burden of establishing the "extraordinary case" of a beneficial parental relationship exception. (*In*

[3] Now renumbered as section 366.26, subdivision (c)(1)(B)(i). We refer to the version, however, that was in effect at the time of the permanent plan hearing.

re Jasmine D., supra, 78 Cal.App.4th 1339, 1350.) Although she and the children may have had loving and positive visits, she did not occupy a parental role in their lives. At the time of the permanent plan hearing, the children had lived with their grandmother for nearly 19 months. For much of the family reunification services period, Mother struggled with her mental illness and was hospitalized several times for suicide attempts. During the period of dependency, the children's grandmother fulfilled the parental role.

Moreover, Mother elicited the testimony concerning post-adoption visitation. The juvenile court discussed the evidence only in response to Mother's argument for a legal guardianship instead of adoption. Our review of the record does not indicate that the court improperly considered or relied upon grandmother's testimony regarding future visitation.

III.

Mother argues that the juvenile court erred by not applying the 2007 amendments to section 366.26, regarding appointment of a relative with whom a child is currently residing as a legal guardian in lieu of adoption. (§ 366.26, subds. (b)(2) & (c)(1)(A).) She concedes that the permanent plan hearing here occurred prior to the effective date of the amendments. Mother asserts that the amendments further legislative intent to promote legal guardianship by relative-caregivers rather than non-relative adoption. She requests that we remand the matter to determine the maternal grandmother's wishes regarding legal guardianship.

The 2007 amendment to section 366.26, subdivision (c)(1)(A) requires the juvenile court to terminate parental rights under certain circumstances unless the dependent child "is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship. . . ." The Legislature did not expressly intend that the amendment operate retroactively. For the reasons stated in *In re Raymond E.* (2002) 97 Cal.App.4th 613, 618, regarding the sibling exception to

termination of parental rights (§ 366.26, subd. (c)(1)(E)), we conclude that the Legislature did not impliedly intend that the amendments here apply retroactively.

More importantly, however, there is no evidence that the children's grandmother was reluctant to adopt the children, that she was pressured to do so, or that she preferred a legal guardianship. The grandmother informed CWS that she was not interested in a kinship adoption, which she understood to be a "mother on paper." We do not find Mother's speculation persuasive that the grandmother would change her mind about adoption in favor of a legal guardianship.

The orders are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

James E. Herman, Judge

Superior Court County of Santa Barbara

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Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Dennis A. Marshall, County Counsel, Toni Lorien, Deputy, for Plaintiff and Respondent.